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Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: WT Docket No. 02-55
Ex Parte Presentation

Dear Ms. Dortch:

Nextel Communications, Inc. ("Nextel") hereby responds to the *ex parte* filing submitted by the Cellular Telecommunications & Internet Association ("CTIA") in the above-referenced proceeding on December 4, 2003 ("*CTIA Ex Parte*").¹ More than 20 months after the Commission initiated this proceeding, CTIA suddenly offers a memorandum on how the Consensus Plan for 800 MHz Realignment (the "Consensus Plan") would allegedly violate the competitive bidding provisions of Section 309(j) of the Communications Act of 1934, as amended ("the Act").² In its memorandum, CTIA applies inapposite precedent, distorts the comparative value of Nextel's current licenses and proposed replacement spectrum, and ignores the enormous societal benefits that would result from the Consensus Plan. The Commission should reject this last-ditch effort, and should instead move expeditiously to adopt the Consensus Plan in its entirety.³

¹ The "*Consensus Plan*" *Spectrum Grant Proposal Violates Well-Established Licensing Policy and Qualifies Neither as a "Channel Swap" Nor as a "License Modification,"* attached to Letter from Diane Cornell, CTIA, to Marlene Dortch, Secretary, FCC (Dec. 4, 2003) ("*CTIA Ex Parte*"). (Unless otherwise indicated, all comments and *ex parte* filings referenced herein were filed in WT Docket No. 02-55.)

² 47 U.S.C. § 309(j).

³ In addition to contributing 10.5 MHz of spectrum to make realignment possible, Nextel has committed to provide up to \$850 million to fund the relocation of public safety and private wireless licensees necessary to carry out realignment. Nextel will also

I. The CTIA Ex Parte is Eleventh-Hour Sophistry Designed to Sidetrack the Commission's Effort to Improve Public Safety Communications

The Commission initiated the instant proceeding with its Notice of Proposed Rulemaking (“NPRM”) in March 2002.⁴ More than 20 months after the Commission issued the NPRM, and almost a year and a half since the Consensus Plan was filed,⁵ CTIA now submits a memorandum purporting to demonstrate the Plan’s supposed inconsistency with both Section 309(j) and applicable auction precedent. Apparently under wraps through three rounds of comments and replies, CTIA’s memorandum is nothing but a competitively-driven, eleventh-hour effort to sidetrack the Commission’s efforts to improve public safety communications.

CTIA’s last-minute protests regarding the Commission’s legal authority are especially ironic in light of CTIA’s own proposal earlier in this proceeding to resolve public safety interference by relocating public safety licensees to the 700 MHz band.⁶ Congress would have to enact and the President would have to sign several significant statutory amendments to the Act before the Commission could even adopt CTIA’s unlawful “solution.”⁷

The Commission should also bear in mind that this is not the first time CTIA has strategically put forward new arguments so late in a proceeding. In particular, in the Commission’s proceeding on the reallocation of Mobile Satellite Service spectrum at 2 GHz,⁸ CTIA in January 2003 made new arguments regarding potential interference to

spend approximately \$150 million to install filtering to eliminate interference from out-of-band emissions in compliance with Appendix F of the Consensus Plan, and up to another \$400 million for retuning its own network and effectuating the realignment transition.

⁴ *Improving Public Safety Communications in the 800 MHz Band; Consolidating the 900 MHz Industrial/Land Transportation and Business Pool Channels*, Notice of Proposed Rulemaking, 17 FCC Rcd 4873 (2002).

⁵ See Reply Comments of the Industrial Telecommunications Association, Inc., *et al.* (“the Consensus Parties”) (Aug. 7, 2002).

⁶ See, e.g., Comments of CTIA, at 9-10 (May 6, 2002).

⁷ See Reply Comments of Nextel Communications, Inc., at 55-56 (Aug. 7, 2002) (“Nextel August Reply”).

⁸ See *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, Third Report and Order, Third Notice of Proposed Rulemaking and Second Memorandum Opinion and Order, 18 FCC Rcd 2223, ¶ 25 & n.75 (2003) (“MSS Reallocation Order”).

PCS operations in the 1.9 GHz band.⁹ As another commenter subsequently pointed out, these arguments had already been addressed many months earlier, and were nothing more than a “last minute attempt by CTIA to raise technical issues to prevent adoption of the ATC rulemaking.”¹⁰

II. Section 316 of the Communications Act Provides the Commission With the Authority to Adopt the Consensus Plan and Modify Nextel’s Licenses by Assigning It Spectrum at 1910-1915/1990-1995 MHz

CTIA argues that the Consensus Plan’s proposed assignment to Nextel of replacement spectrum in the 1910-1915/1990-1995 MHz band would violate the auction provisions of Section 309(j).¹¹ This argument is wholly without merit. Contrary to CTIA’s claims – and as Nextel has already explained in this proceeding¹² – the Commission can implement the Consensus Plan by modifying Nextel’s existing licenses under Section 316 of the Act.¹³ In taking such action, the Commission would not be “us[ing] Section 316 to trump [Section] 309(j),” as CTIA lamely alleges.¹⁴ Rather, as reflected in the “clear and unequivocal” language of Section 316 and in applicable Commission and court precedent, the Commission can assign this spectrum to Nextel as long as such action promotes the public interest.¹⁵

⁹ See *Ex Parte* Letters from Diane Cornell, CTIA, to Marlene Dortch, Secretary, FCC, IB Docket No. 01-185 (Jan. 17, 2003).

¹⁰ *Ex Parte* Letter from Cheryl Tritt, Counsel to ICO Global Communications (Holdings) Ltd., to Marlene Dortch, Secretary, FCC, IB Docket No. 01-185 (Jan. 23, 2003).

¹¹ 47 U.S.C. § 309(j)(1).

¹² Comments of Nextel Communications, Inc. at 56-64 (May 6, 2002); Nextel August Reply at 61-68; Reply Comments of Nextel Communications, Inc. and Nextel Partners Inc., at 19-23 (Feb. 25, 2003) (“Nextel February Reply”).

¹³ 47 U.S.C. § 316.

¹⁴ *CTIA Ex Parte* at 10. Significantly, when Congress enacted Section 309(j) of the Act in 1993, it did not repeal or even amend the license modification authority accorded the Commission in Section 316.

¹⁵ See *Establishing Rules and Policies for the Use of Spectrum for Mobile Satellite Services in the Upper and Lower L-Band*, Report and Order, 17 FCC Rcd 2704, ¶¶ 21-29 (2002) (“*MSS Report and Order*”) (recognizing that “the Commission is afforded significant latitude when it exercises its Section 316 authority,” including the latitude “to expand a licensee’s authority”); *Amendment of the Commission’s Rules to Relocate the Digital Electronic Message Service (“DEMS”) from the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service*, Order, 12 FCC Rcd 3471, ¶ 14 (1997), *recon. denied*, 13 FCC Rcd 15147, ¶ 59 (1998) (“*DEMS Order*”) (holding that under Section 316, the Commission can assign reallocated spectrum in another frequency band to existing licensees if such action promotes the public interest).

A. The Consensus Plan's assignment of 1.9 GHz spectrum to Nextel is not a grant of an "initial" license

The Commission can implement the Consensus Plan and modify Nextel's licenses without triggering the competitive bidding requirements of Section 309(j) of the Act, because that provision applies only to the award of "initial" spectrum licenses.¹⁶ For several reasons, the Commission should reject CTIA's puzzling assertion that the Consensus Plan would provide Nextel with an "initial" license.

1. As a fundamental matter, the Consensus Plan's assignment of 1.9 GHz spectrum provides Nextel with *replacement* spectrum

First, as a fundamental matter, rather than awarding Nextel an initial license to use spectrum, the Commission would be modifying, pursuant to Section 316 of the Act, Nextel's *already-existing* licenses. Under the Consensus Plan, the Commission would require Nextel to vacate 10.5 MHz of licensed spectrum at 700, 800, and 900 MHz, and permit Nextel to operate on *replacement* spectrum at 1910-1915/1990-1995 MHz. The fact that this spectrum comes from a newly reallocated band would not make these licenses "initial," because such spectrum would merely replace spectrum already held or in use by Nextel under its existing licenses.

CTIA argues that the Consensus Plan's assignment of replacement spectrum to Nextel in the 1.9 GHz band would not qualify as a legitimate "channel swap" under Commission precedent.¹⁷ Nextel submits that CTIA has failed to demonstrate that the replacement spectrum exchange is legally impermissible. In any case, however, implementing the Consensus Plan does not even require that the assignment of the replacement spectrum to Nextel be considered a "channel swap" as defined by CTIA. As discussed herein, the Commission has authority to assign this spectrum to Nextel as a license modification under Section 316 of the Act.

2. Authorization at 1910-1915/1990-1995 MHz would not "dwarf" Nextel's 10.5 MHz of licensed spectrum at 700, 800, and 900 MHz

In rare cases, license modification requests are treated by the Commission as "initial" applications subject to Section 309(j) auction procedures. Specifically, the Commission has found that a proposed license modification may warrant Commission treatment as an initial application under Section 309(j) "[w]here a modification would be so major as to dwarf the licensee's currently authorized facilities and the application is mutually exclusive with other major modification or initial applications."¹⁸ Neither of

¹⁶ Nextel August Reply at 62-68; Nextel February Reply at 20-23.

¹⁷ CTIA *Ex Parte* at 3-4.

¹⁸ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, Second Report and Order, 9 FCC Rcd 2348, ¶ 37 (1994) ("CMRS Second Report

these conditions, however, applies to the replacement spectrum that Nextel would be assigned under the Consensus Plan.

In its *Ex Parte*, CTIA goes to great lengths to attempt to show how the 10 MHz at 1910-1915/1990-1995 MHz would “dwarf” Nextel’s 10.5 MHz at 700, 800, and 900 MHz.¹⁹ No matter how many times CTIA and various wireless carriers allege a Nextel “windfall,” however, their claims remain baseless.²⁰ The Consensus Plan’s proposals do not even come close to satisfying the Commission’s “major modification” criteria.

The November 20 study entitled “The Consensus Plan: Promoting the Public Interest – A Valuation Study” buttresses this point.²¹ In his study, Dr. Kostas Liopiros concludes that the Consensus Plan would provide a fair and equitable spectrum exchange for all affected parties. Specifically, Dr. Liopiros analyzes the comparative value of the Consensus Plan spectrum exchange using three different approaches: a direct comparison of spectrum on a kHz-for-kHz basis, a comparison of auction and acquisition prices for comparable spectrum, and a comparison of recent secondary market transactions for comparable spectrum. Under each approach, Dr. Liopiros finds that the 1910-1915/1990-1995 MHz band is comparable in value to Nextel’s contributions under the Consensus Plan, and that the Consensus Plan therefore would not confer a spectrum value “windfall” on Nextel.²² In light of this report, CTIA has offered no persuasive argument and there is no basis to conclude that the Consensus Plan’s license modifications and spectrum

and Order”).

¹⁹ CTIA *Ex Parte* at 5-8.

²⁰ These claims are not only baseless, they are hypocritical. The cellular industry has previously obtained a number of rule modifications that significantly enhanced the value of its spectrum, yet at no point did cellular carriers insist that these modifications triggered Section 309(j)'s competitive bidding requirements. *See* Reply Comments of Nextel at 26-27 (Aug. 7, 2002) (describing FCC decisions allowing cellular carriers to deploy new technologies and services, including digital service and paging, and allowing cellular and other CMRS providers to offer fixed wireless services on a co-primary basis with commercial mobile services). Cingular has recently added to the hypocrisy of these windfall arguments by seeking a multi-million dollar waiver of the Commission's unjust enrichment rules in its application to acquire certain PCS licenses held by NextWave Communications. Cingular's waiver request flouts the Communications Act and the Commission's rules. *See* Comments of Nextel, WT Docket No. 03-217 (Nov. 5, 2003). In contrast, the Consensus Plan, including its proposal to provide Nextel replacement spectrum in the 1.9 GHz band, is fully consistent with Section 316 of the Act and Commission precedent.

²¹ *See* Dr. Kostas Liopiros, Sun Fire Group LLC, *The Consensus Plan: Promoting the Public Interest – A Valuation Study*, attached to Letter of Lawrence R. Krevor, Nextel, to Marlene Dortch, Secretary, FCC (Nov. 20, 2003) (“Liopiros Study”).

²² Liopiros Study at 2-3.

exchanges would so enhance Nextel's facilities as to "dwarf" its currently authorized nationwide 800 MHz iDEN® network serving over 12 million subscribers.²³

In its *Ex Parte*, CTIA cites another interpretation of the term "initial license," put forward by the D.C. Circuit in 1999 in *Fresno Mobile Radio, Inc.*²⁴ In that case, the Court rejected a challenge to the Commission's decision to auction newly-established geographic-area Specialized Mobile Radio ("SMR") licenses in the upper 200 channels of the SMR band. In finding that these new overlay licenses fell within the meaning of "initial" under Section 309(j)(1), the Court stated that a license is subject to Section 309(j)(1) if it "differ[s] in some significant way from the license it displaces," and if "it is the first awarded for a particular frequency under a new licensing scheme, that is, one involving a different set of rights and obligations for the licensee."²⁵

Contrary to CTIA's assertion, the D.C. Circuit's decision in *Fresno Mobile Radio* does not require application of Section 309(j) in the 800 MHz proceeding. First, *Fresno Mobile Radio* is factually inapposite to the 800 MHz proceeding. In *Fresno Mobile Radio*, the licenses at issue were *new* overlay authorizations rather than replacement spectrum, and it is not clear how or even *if* the standard enunciated there should be applied to Section 316 modifications of already-existing licenses. In any event, even if the *Fresno Mobile Radio* standard were applied here, the assignment of replacement spectrum in the 1.9 GHz band to Nextel would not be covered by the Court's definition

²³ Moreover, a common sense evaluation of the facts belies CTIA's "major modification" argument. First, Nextel today holds an average of 26 MHz of spectrum in markets throughout the United States. Following realignment, Nextel would still hold an average of 26 MHz in markets throughout the nation. Second, Nextel today serves approximately 12 million customers, making it the fifth largest national wireless carrier. Nextel's average revenue per unit ("ARPU") leads the industry by a wide margin, and Nextel's customers are more loyal and provide greater "lifetime" revenue than its competitors obtain from their customers. Third, Nextel's competitors are scrambling to emulate Nextel's push-to-talk digital walkie-talkie service – a major factor in Nextel's industry-leading performance metrics. Fourth, the replacement spectrum that Nextel would receive under the Consensus Plan is heavily encumbered with Broadcast Auxiliary Services, which must be relocated, and Nextel must deploy a new wireless communications system before it can operationally replace the spectrum contribution necessary for 800 MHz realignment; *i.e.*, Nextel will be operating on less than its current spectrum resources during and possibly for some time after realignment. Finally, the replacement spectrum Nextel would receive at 1.9 GHz has less favorable propagation characteristics than its current spectrum holdings. *See* Liopiros Study at 19. These facts demonstrate that the Consensus Plan spectrum exchange would not in any way dwarf Nextel's current spectrum position or its currently authorized wireless communications services, facilities or business.

²⁴ *CTIA Ex Parte* at 8; *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 970 (D.C. Cir. 1999).

²⁵ *Id.*

of “initial” license. In aggregate, Nextel’s replacement licenses at 1.9 GHz would give it rights and duties similar to those it has under its existing licenses. At 1.9 GHz, Nextel would be licensed to provide CMRS virtually nationwide, as it is today in other frequency bands.²⁶

3. There should be no mutual exclusivity in the 1910-1915/1990-1995 MHz band, given the extraordinary public interest benefits of the Consensus Plan

As indicated above, the Commission will not treat a proposed modification as an “initial” application under Section 309(j) unless it is also “mutually exclusive with other . . . applications.”²⁷ In the instant proceeding, there should be no mutual exclusivity in the reallocated 1910-1915/1990-1995 MHz band.²⁸ As Nextel has pointed out previously, the Commission has full discretion to promulgate rules that limit eligibility to apply for a license, as long as such rules promote the public interest and there is a reasoned explanation for that action.²⁹ Implementation of the Consensus Plan would greatly benefit the public interest by improving public safety communications, and, as a result, the Commission can substitute this 1.9 GHz spectrum for channels currently assigned to Nextel in other frequency bands without triggering Section 309(j)’s competitive bidding provisions.

The Consensus Plan will yield enormous societal benefits. By remedying interference to public radio systems in the 800 MHz band and providing much needed additional spectrum for public safety systems, the Consensus Plan will save lives and help first responders protect Americans against terrorism, crime, natural disasters and other emergencies.³⁰ As described in the Liopiros Study, economic losses in the United States due to crime and fire are estimated at well over \$1 trillion a year. Even a small reduction in these costs resulting from improved public safety communications will

²⁶ *Id.* As CTIA indicates, the *Fresno Mobile Radio* test was applied by the D.C. Circuit one year later in *Benkelman Telephone Co. v. FCC*, 220 F.3d 601, 605 (D.C. Cir. 2000), another inapposite case involving new, geographic-area overlay licenses, this time in the paging service.

²⁷ *CMRS Second Report and Order* ¶ 37.

²⁸ In February 2003, the Commission reallocated the 1990-1995 MHz frequency band to terrestrial Fixed and Mobile Services, and proposed to reallocate the 1910-1915 MHz UPCS band to Fixed and Mobile Services. In taking these reallocation steps, the Commission indicated that, among other options, it is considering the assignment of these frequencies to Nextel as replacement spectrum in conjunction with the Consensus Plan. *See MSS Reallocation Order* ¶¶ 47, 49.

²⁹ Nextel February Reply at 20, 22; *see, e.g., United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 439 (D.C. Cir. 1991); *MSS Report and Order* ¶ 25.

³⁰ *See Liopiros Study* at 3-10.

produce *public benefits on the order of billions of dollars on a recurring basis year after year*.³¹ Eliminating interference and improving public safety communications will save lives – both those of first-responders and the public they serve. Clearly, the substantial, recurring societal benefits of the Consensus Plan far exceed the one-time costs of implementing the Plan. The Consensus Plan will also cover all incumbent relocation costs, thereby avoiding the need for taxpayer funding.

There are important policy interests underlying the competitive bidding provisions of Section 309(j), and, as a general matter, Nextel believes that competitive bidding “encourage[s] growth and competition, result[s] in the rapid deployment of new technologies and services, and promote[s] efficient spectrum use.”³² In the case of the 800 MHz proceeding, however, the compelling public interest benefits that would result from the Consensus Plan outweigh the public interest in spectrum auctions.

According to CTIA, two recent Commission decisions previously cited by Nextel fail to provide support for the position that the Commission can now limit eligibility for licensing at 1910-1915/1990-1995 MHz. CTIA argues that in both the 2002 *MSS Report and Order* and the 1997 *DEMS Order*, “the Commission and the incumbent licensee were faced with circumstances outside their control that precluded effective deployment.”³³ In the case of the L-band, international coordination constraints had prevented the sole MSS L-band licensee from being able to access a sufficient amount of its licensed spectrum; in the DEMS context, DEMS licensees had to move to new spectrum in order to avoid causing harmful interference to military satellite systems. CTIA claims that, in contrast, Nextel has not been precluded from providing service on its existing spectrum.

Contrary to CTIA’s assertion, these decisions affirm the Commission’s broad power to modify licenses and bolster its legal authority to adopt the Consensus Plan. Just as it was in the public interest to (i) assign the MSS L-band licensee additional frequencies to address the spectrum constraints resulting from international coordination, and (ii) assign DEMS licensees replacement spectrum to avoid interference to military systems, it is also in the public interest to resolve CMRS – public safety interference and allocate additional spectrum to public safety by relocating Nextel to a new spectrum band. At the very least, these decisions confirm the underlying principle that the Commission can limit licensing eligibility for new spectrum if doing so will realize significant public interest benefits, as is the case with the Consensus Plan.

CTIA ignores another Commission decision earlier this year that affirms both the “mutual exclusivity” and “major modification” principles described above. In the February 2003 *MSS/ATC Order* permitting existing MSS licensees to integrate ATC

³¹ *Id.* at 10.

³² *CTIA Ex Parte* at 2.

³³ *Id.* at 12.

facilities into their MSS networks,³⁴ the Commission expressly rejected the arguments of some commenters that its action implicated the competitive bidding provisions of Section 309(j). Specifically, the Commission held that, because the class of licensees eligible to acquire terrestrial rights in the MSS bands was limited to pre-existing MSS operators, “section 309(j)(1)’s requirement of mutually exclusive applications will not be met.”³⁵ In addition, the Commission held that “the license modifications associated with ATC will not be modifications so different in kind or so large in scope and scale as to warrant treatment as ‘initial’ licenses subject to section 309(j)(1).”³⁶ The license modifications at issue in the Consensus Plan are far less significant in scope and scale than those associated with the *MSS/ATC Order*.

III. Conclusion

Contrary to CTIA’s eleventh-hour claims, the Commission has authority to implement the Consensus Plan by modifying Nextel’s existing licenses under Section 316 of the Communications Act. Nextel again urges the Commission to adopt the Consensus Plan as soon as possible, in order to resolve CMRS – public safety interference and improve the quality of public safety communications in the United States.

Pursuant to section 1.1206(b) of the Commission’s rules, 47 C.F.R. § 1.1206(b), this *ex parte* notification is being filed electronically for inclusion in the public record of the above-referenced proceeding.

Sincerely,

/s/ Regina M. Keeney
Regina M. Keeney

Attorneys for Nextel Communications, Inc.

³⁴ See *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 1962 (2003) (“*MSS/ATC Order*”).

³⁵ *Id.* ¶ 221.

³⁶ *Id.* ¶ 225.